Bartlett Heating & Air Conditioning, Inc., and Robert Bartlett, Inc., successors, alter egos, and/or single employer *and* Michael Bauer. Case 13–CA–39134

August 20, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon charges and amended charges filed by Michael Bauer on February 8, April 4, and June 28, 2001, the General Counsel issued the first amended complaint on July 16, 2001, against the Respondents, Bartlett Heating & Air Conditioning, Inc. (Bartlett Heating), and Robert Bartlett, Inc. (Robert Bartlett), successors, alter egos, and/or single employer. The complaint alleges that the Respondents violated Section 8(a)(1) and (3) of the Act by laying off and/or discharging, and refusing to reinstate, employees Michael Bauer and Robert Wailley because they assisted Sheet Metal Workers' International Union, Local Union 73 (the Union), and engaged in concerted activities. The Respondents each filed an answer to the complaint.

On October 4 and 10, 2001, respectively, Respondents Robert Bartlett and Bartlett Heating entered into a settlement agreement (agreement), which was approved by the Regional Director for Region 13 on October 12, 2001. Under the terms of the agreement, the Regional Director's approval constituted withdrawal of the complaint and the Respondents' answers to the complaint. The agreement required the Respondents to (1) make Bauer whole by paying him backpay in the amount of $21,054.08 and make Wailley whole by paying him backpay in the amount of $945,92; and (2) post a notice to employees regarding the complaint allegations. The agreement also contains the following provisions:

> The Charged Parties agree that in case of noncompliance with any of the terms of this Settlement Agreement by the Charged Parties, including but not limited to, failure to make timely installment payments of monies as set forth below, and after 15 days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, the Answers of the Charged Parties shall be considered withdrawn. Thereupon, the Board shall issue an Order requiring the Charged Parties to Show Cause why said Motion of the General Counsel shall not be Granted. The Board may then, without necessity of trial, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations, adverse to the Charged Parties, on all issues raised by the pleadings. The Board may then issue an Order providing full liquidated remedy in the amount of $22,000, less any amounts already paid by the Charged Parties, for the violations found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement. The parties further agree that a Board Order and a U.S. Court of Appeals Judgment may be entered hereon ex parte.
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> A) The Charged Parties will make whole Wailley in the gross amount of $945.92 under the following terms:
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> On October 22, 2001, the Charged Parties will submit to the National Labor Relations Board Thirteenth Regional Office the gross amount of $945.92 less taxes payable to Wailley.
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> B) The Charged Parties will make whole Bauer in the gross amount of $21,054.08 under the following payment schedule:
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> On October 22, 2001, the Charged Parties will submit to the National Labor Relations Board Thirteenth Regional Office the gross amount of $1,054.08 less taxes payable to Bauer. Thereafter, the Charged Parties will submit to Region 13 the gross amount of $1,000.00 less taxes payable to Bauer on a weekly basis each Monday beginning on October 29, 2001 and continuing through and including March 11, 2002.

By letter dated October 26, 2001, the compliance officer for Region 13 advised the Respondents that they were in default of the settlement agreement because they had failed to post a notice required by the agreement and had failed to remit payments due under the agreement. The letter further advised the Respondents that, if they did not cure their default within 15 days, the compliance officer would recommend that the Region immediately seek the full amounts due Bauer and Wailley. The Respondents did not comply.[1]

By letter dated December 12, 2001, the compliance officer once again advised the Respondents that they were

[1] There apparently was an error in the notices provided to the Respondents because, by letter dated November 5, 2001, the compliance officer provided the Respondents with corrected notices. In addition, the compliance officer reminded the Respondents of their obligation to cure their default, giving them until November 8, 2001. He also repeated his warning that, absent compliance, he would recommend immediate action to obtain the full outstanding balance due under the settlement, then $21,000. The Respondents still did not comply.

in default of the settlement agreement because they had failed to post the required notice and to remit moneys due under the agreement.[2] The compliance officer provided the Respondents with an additional 15 days to comply with the agreement and, once again, warned that their failure to do so would lead to the Region setting aside the agreement and immediately instituting proceedings to collect the debt owed.

Having received no additional payments from the Respondents, on February 25, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. The General Counsel submits that the Respondents defaulted on the settlement agreement by failing to post a required notice and make required payments, and that their answers should therefore be considered withdrawn. On February 27, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the Motion for Summary Judgment, although the Respondents initially filed answers to the complaint, they subsequently entered into a settlement agreement, which provided for withdrawal of the answers in the event of noncompliance with the settlement agreement. The Respondents have failed to comply with the settlement agreement by refusing to post the required notice to employees and to remit the agreed-on backpay amount by failing to pay $17,891.84 for Bauer. Consequently, we find that the Respondents' answers have been withdrawn by the terms of the settlement agreement, and that, pursuant to the provisions of the settlement agreement set forth above, we find that all the allegations of the complaint are true.[3]

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Bartlett Heating, a corporation, with an office and place of business in Mount Prospect, Illinois, has been engaged in the business of fabricating and installing sheet metal products used in heating ventilation and air-conditioning. During the calendar year preceding issuance of the complaint, a representative period, Respondent Bartlett Heating, in conducting its business described above, derived gross revenues in excess of $500,000, and has purchased and received goods and services valued in excess of $50,000 directly from points located outside the State of Illinois.

At all material times, Robert Bartlett, an Illinois corporation, with an office and place of business in Mount Prospect, Illinois, has been engaged in the business of fabricating and installing sheet metal products used in heating ventilation and air-conditioning. Based on a projection of its operations since about June 2001, when it commenced operating, Robert Bartlett, in conducting its business, will derive gross revenues in excess of $500,000, and will purchase and receive goods and services valued in excess of $50,000 directly from points located outside the State of Illinois.

We find that Respondents Bartlett Heating and Robert Bartlett are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On about June 5, 2001, Robert Bartlett purchased the business of Bartlett Heating, and since then has continued to operate the business in a basically unchanged form, and has employed as a majority of its employees former employees of Bartlett Heating. We find that Robert Bartlett has continued the employing entity and is a successor to Bartlett Heating within the meaning of the Act.

At all material times, the Respondents have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises. We find that Bartlett Heating and Robert Bartlett constitute a single employer within the meaning of the Act.

On about June 5, 2001, Bartlett Heating established Robert Bartlett as a disguised continuation of Bartlett Heating. We find that Bartlett Heating and Robert Bartlett are alter egos within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondents within the meaning of Section 2(11) of the Act and agents of the Respondents within the meaning of Section 2(13) of the Act:

[2] The outstanding balance under the settlement was then $17,891.84, all of which appears to have been due Bauer.

[3] *JAE Consulting & Development*, 326 NLRB No. 40 (1998) (not reported in Board volumes); *U-Bee, Ltd.*, 315 NLRB 667 (1994).

Robert Bartlett	Owner, Bartlett Heating; President, Robert Bartlett
Corinne Bartlett	Owner, Robert Bartlett
Jim Bartlett	President and CEO and Owner, Bartlett Heating; Supervisor/Manager, Robert Bartlett
Albert Ferraresi	Superintendent
Deborah Martin	Office Manager

On about February 1, 2001, the Respondents, by Jim Bartlett, laid off and/or discharged, and since about that date have refused to reinstate, their employees Michael Bauer and Robert Wailley. The Respondents engaged in this conduct because Bauer and Wailley assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By laying off and/or discharging employees Bauer and Wailley, and refusing to reinstate them, because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, the Respondents have been discriminating in regard to the hire, tenure, or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization. The Respondents have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(1) and (3) by laying off and/or discharging Michael Bauer and Robert Wailley, we shall order the Respondents to make them whole for loss of earnings and other benefits suffered as a result of the unlawful discrimination against them by paying them the liquidated damages amount set forth in the noncompliance portion of the settlement agreement. The General Counsel's motion states that there is an outstanding balance in the amount of $17,891.94. Accordingly, we shall order the Respondents immediately to remit this amount to the Region for payment to the discriminatees.[4]

Although the General Counsel's motion alleges that the Respondents have failed to comply with the notice-posting requirement of the settlement agreement, we will not require the Respondents to post a notice in view of the terms of the settlement agreement. As described above, the settlement agreement provided that in the event of noncompliance, the Respondents would be obligated to pay a "full liquidated remedy in the amount of $22,000, less any amounts already paid by the Charged Parties, for the violations found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement." We find that this language is ambiguous regarding what remedies would be warranted to remedy the Respondents' violations in the event of noncompliance. In the absence of clear and unambiguous language in the settlement agreement that, in the event of their noncompliance, the Respondents undertook any obligation other than the payment of the prescribed amount of backpay, we do not find it appropriate to provide for any remedies beyond the payment of $22,000, less any amounts already remitted.

Thus, we do not agree with our dissenting colleague that the ambiguity in the noncompliance clause should be resolved by providing for the Board's standard remedies. Unlike our dissenting colleague, we find that this ambiguity limits the remedy that properly may be ordered here. In a default judgment proceeding such as this, the Board should be reluctant to impose a remedy by default in the absence of clear language in the noncompliance clause.[5] Although it may be true, as stated by our colleague, that the parties "contemplated something more than the monetary payment" set forth in the noncompliance clause, the parties did not, in fact, adequately provide in the clause for any further relief or for the Board's standard remedies. Instead, the noncompliance clause expressly requires the Respondents to pay a specific amount as the "full liquidated remedy."[6] We are unwilling in these circumstances to go beyond the language of the noncompliance clause, which we find is controlling and must be distinguished from the substantive provisions of the settlement agreement itself.[7]

[4] The General Counsel's motion indicates that this entire amount represents money owed to Bauer, and that the Respondents have satisfied their backpay obligation to Wailley. We will, however, leave to the Region the matter of the proper disbursement of the amount due under the settlement agreement.

[5] Cf. *Parks International Corp*., 339 NLRB 285, 286 fn. 4 (2003) (complaint found too ambiguous to impose joint employer liability for discharges in default judgment proceeding).

[6] Thus, *L.J. Logistics, Inc*., 339 NLRB 729 (2003), cited by our dissenting colleague, is distinguishable. In contrast to the limited remedy set forth in the clause here, the noncompliance clause of the settlement agreement in *L.J. Logistics* provided for a "full remedy for the violations so found as is customary to remedy such violations, not limited to provisions of this Settlement Agreement." Id..

[7] Although a remedy normally accompanies the finding of a violation, finding a violation is not entirely meaningless without a remedy.

ORDER

The National Labor Relations Board orders that the Respondents, Bartlett Heating & Air Conditioning, Inc., and Robert Bartlett, Inc., successors, alter egos and/or single employer, Mount Prospect, Illinois, their officers, agents, successors, and assigns, shall

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately remit $17,891.94 to Region 13 to be disbursed to employees Bauer and Wailley in accordance with the terms of the settlement agreement.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

MEMBER LIEBMAN, dissenting in part.

I dissent from my colleagues' failure to provide the Board's full standard remedies. Where the Board, as here, finds all the allegations of a complaint to be true, the standard remedies would include reinstatement and full make-whole relief, an expungement requirement, a cease-and-desist order, and the posting of a notice that describes employees' basic rights under the Act, indicates the manner in which the respondent has violated the Act, and gives assurances of actions required to remedy the unfair labor practices.[1]

Indeed, language in the noncompliance clause here reflects that the parties contemplated something more than the monetary payment provided by my colleagues. Thus, the clause states that "in case of noncompliance with any of the terms of this Settlement Agreement . . . including but not limited to, failure to make" specified monetary payments, the "Board may then issue an Order providing full liquidated remedy . . . for the violations found as is customary to remedy such violations, including *but not limited to* the provisions of this Settlement Agreement." (Emphasis added.)

My colleagues deny these standard remedies, including the notice posting specifically provided for in the settlement agreement. They do so without explanation save that the noncompliance clause "is ambiguous regarding what remedies would be warranted to remedy the Respondents' violations in the event of noncompliance." In their view,

> [I]n the absence of clear and unambiguous language in the settlement agreement that, in the event of their noncompliance, the Respondent undertook any obligation other than the payment of the prescribed amount of backpay, we do not find it appropriate to provide for any remedies beyond the payment of $22,000, less any amounts already remitted.

The majority's conclusion is counterintuitive.[2] Where a settlement agreement provides that in the case of noncompliance the Board may find all allegations of the Complaint to be true, the Board's standard remedies ("as is customary to remedy such violations"), including the notice posting, should be afforded, *unless* clear and unambiguous language in the noncompliance clause provides otherwise. Only in that case should those standard remedies be withheld. Compare *Henry's Refrigeration, Heating & Air*, 339 NLRB 698, 704 (2003) (noncompliance clause specifically provided that the specified liquidated damages were "a full remedy as specified in the Complaint").[3] Any ambiguity in the noncompliance clause, in other words, should be resolved in favor of following the Board's customary approach and against the wrongdoer. Accordingly, I would provide the standard remedies here.

In the event of continuing misconduct, the violations found here may be cited in any future case involving the Respondents to support issuance of a broad cease-and-desist order.

[1] See, e.g., *JAE Consulting & Development*, 326 NLRB No. 40 (1998) (not reported in Board volumes); *U-Bee, Ltd.*, 315 NLRB 667 (1994); and *F L Trucking Corp.*, 313 NLRB 1172 (1994).

[2] Unlike *Parks International Corp*., 339 NLRB 285, relied on by my colleagues, in this case there is no ambiguity in the underlying complaint.

[3] In *L.J.Logistics, Inc.*, 339 NLRB 729, the settlement agreement expressly provided that in the event of noncompliance, the Board could issue an order "providing a full remedy for the violations so found as is customary to remedy such violations, not limited to provisions of this Settlement Agreement." That language, although not identical to the clause in the settlement agreement here, is close to it and certainly different than the language in *Henry's Refrigeration*, supra.